PENANG PORT COMMISSION

v.

KANAWAGI SEPERUMANIAM

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
SITI NORMA YAAKOB FCJ
MOHTAR ABDULLAH FCJ
[CIVIL APPEAL NO: 02-14-98(W)]
21 NOVEMBER 2002

CONSTITUTIONAL LAW: *Courts - Jurisdiction of Court of Appeal - Orders made - Whether were beyond jurisdiction - Whether court seized with jurisdiction to grant interim orders and make incidental orders in prescribed circumstances - Whether orders made by previous Court of Appeal properly set aside - Courts of Judicature Act 1964, ss. 43 and 44*

The respondent had commenced an action for wrongful dismissal against the appellant in High Court which resulted in, *inter alia*, damages being awarded in his favour. The appellant's application for a stay of execution was rejected by the deputy registrar and the High Court. The respondent initiated garnishee proceedings and succeeded in obtaining a garnishee order absolute. When the appellant's application to stay the garnishee order absolute was set aside by the High Court, it appealed to the Court of Appeal. On 3 January 1995, the Court of Appeal made a restraining order against the respondent to restrain him from disposing the sum deposited in a bank account. On 2 August 1995, the Court of Appeal ordered the respondent to deposit the judgment sum with the court. Subsequently, an application was forwarded by the respondent to the Court of Appeal to set aside the orders dated 3 January and 2 August 1995. The Court of Appeal on 6 November 1996, granted the respondent's application on the premise that the said orders were made without jurisdiction.

The issue before this court was whether the orders made by one Court of Appeal could be set aside by another Court of Appeal in the context of ss. 43 and 44 of the Courts of Judicature Act 1964 ('CJA').

Held:

Per Steve Shim CJ (Sabah & Sarawak)

[1] The Court of Appeal had, on 6 September 1996, taken the view that as the application for injunctive orders made by the appellant was not made in first instance to the High Court, the orders handed down by the earlier panel of the Court of Appeal on 3 January and 2 August 1995 contravened s. 43 of the CJA in that it had no jurisdiction to do so. This proposition, however, ran counter to the express provisions of s. 44 of the CJA which specifically conferred upon the Court of Appeal the jurisdiction to grant interim orders and make incidental orders in prescribed circumstances. (p 824 d-e)

[1a] Under s. 44 of the CJA, the Court of Appeal when considering applications before it may take into consideration the failure on the part of the appellant in not complying with s. 43. It may inquire into the reasons for such failure. If the failure has caused prejudice to the other side resulting in injustice, it is perfectly entitled to reject the application. If no injustice is caused, there is no reason for not granting the application. (p 825 a-b)

[2] The Court of Appeal had on 6 November 1996 erred in setting aside the injunctive orders made previously by the Court of Appeal on 3 January and 2 August 1995 respectively. (p 825 c-d)

[Appeal allowed with costs; deposit to be refunded to the appellant.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden telah memulakan suatu tindakan kerana pembuangan kerja yang tidak sah terhadap pihak perayu yang berkeputusan dengan, antara lain, pampasan diberi kepadanya. Permohonan perayu untuk penggantungan pelaksanaan ditolak oleh timbalan pendaftar dan Mahkamah Tinggi. Responden kemudiannya memulakan prosiding garnisi dan berjaya mendapatkan suatu perintah garnisi mutlak. Bila permohonan perayu untuk mendapatkan suatu penggantungan terhadap perintah garnisi mutlak tersebut diketepikan oleh Mahkamah Tinggi, ia membuat rayuan ke Mahkamah Rayuan. Pada 3 Januari 1995, Mahkamah Rayuan telah membuat suatu perintah sekatan terhadap responden menyekatnya dari membawa keluar jumlah wang yang telah didepositkan ke dalam suatu akaun bank. Pada 2 Ogos 1995, Mahkamah Rayuan telah memerintahkan responden untuk mendepositkan jumlah wang penghakiman tersebut dengan mahkamah. Sejurus kemudian, suatu permohonan telah dikemukakan oleh responden di Mahkamah Rayuan untuk mengetepikan perintah-perintah bertarikh 3 Januari

dan 2 Ogos 1995. Mahkamah Rayuan pada 6 November 1996, telah membenarkan permohonan responden atas alasan perintah-perintah tersebut telah dibuat tanpa bidangkuasa.

Isu di hadapan mahkamah semasa adalah sama ada dalam konteks ss. 43 dan 44 Akta Mahkamah Kehakiman 1964 ('AMK') perintah yang dibuat oleh satu Mahkamah Rayuan boleh diketepikan oleh Mahkamah Rayuan yang lain.

Diputuskan:
Oleh Steve Shim KH (Sabah & Sarawak)

[1] Pada 6 September 1996 Mahkamah Rayuan telah berpendapat bahawa oleh kerana permohonan untuk perintah-perintah injunktif yang dibuat oleh perayu tidak dibuat pada mulanya di Mahkamah Tinggi, perintah-perintah yang dibuat oleh panel Mahkamah Rayuan sebelumnya pada 3 Januari dan 2 Ogos 1995 mengingkari s. 43 AMK oleh kerana ia tidak mempunyai bidangkuasa untuk berbuat begitu. Pendapat ini, walau bagaimanapun, adalah bertentangan dengan peruntukan nyata di bawah s. 44 AMK yang secara khususnya memberikan bidangkuasa kepada Mahkamah Rayuan untuk membuat perintah-perintah interim dan membuat perintah sampingan dalam keadaan tertentu.

[1a] Di bawah s. 44 AMK, Mahkamah Rayuan bila menimbangkan permohonan di hadapannya boleh mengambilkira kegagalan perayu mematuhi s. 43. Ia boleh mempersoalkan sebab-sebab kegagalan tersebut. Jika kegagalan tersebut menyebabkan prejudis kepada pihak lain sehingga berlakunya ketidakadilan, ia berhak untuk menolak permohonan tersebut. Jika ketidakadilan tidak wujud, maka tidak ada sebab untuk menolak permohonan itu.

[2] Mahkamah Rayuan telah, pada 6 November 1996, khilaf dalam mengetepikan perintah-perintah injuktif yang dibuat oleh Mahkamah Rayuan tersebut sebelum itu pada 3 Januari dan 2 Ogos 1995.

Rayuan dibenarkan dengan kos; deposit dipulangkan kepada pihak perayu.]

Case(s) referred to:
Penang Port Commission v. Kanawagi Seperumaniam (No 1) [1997] 1 CLJ 423 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 43, 44

For the appellant - Raja Aziz Addruse (Chew Eng Keat); M/s Lim Huck Aik & Co

For the respondent - Shahul Hameed Amirudin (Gregory Dicom); M/s Khana & Co

[Appeal from Court of Appeal; Civil Appeal No: W-03-16-1994]

Reported by M Maheswaran

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

The Issues

On 14 October 1998, the Federal Court granted the appellant leave to appeal against the decision of the Court of Appeal given on 6 September 1996. However, no specific question has been framed for our consideration. Be that as it may, the memorandum of appeal has raised essentially the following issues:

(1) That the Court of Appeal has misdirected itself in law in allowing the respondent's application to set aside the previous orders of the Court of Appeal granted on 3 January 1995 and 2 August 1995 respectively;

(2) That the Court of Appeal has misdirected itself on the construction of s. 43 and s. 44 of the Courts of Judicature Act 1964.

In our view, the issues raised can be effectively condensed into one postulatum, namely, whether the orders made by one Court of Appeal can be set aside by another Court of Appeal in the context of ss. 43 and 44 of the Courts of Judicature Act 1964. This important question of law should be sufficient to dispose the appeal.

The Background

The factual background is somewhat complicated but it needs to be stated in order to understand the perspectives. On 14 May 1987, the respondent filed a suit for wrongful termination of service, praying the following:

(a) a declaration that his termination was unlawful;

(b) a declaration that the respondent had obtained a pass in Bahasa Melayu at SPM level and had therefore satisfied the appellant's condition to be confirmed as a traffic supervisor;

(c) an order that damages be assessed with interest; and

(d) costs.

On 18 July 1994, the High Court, pursuant to an application by the respondent, granted him summary judgment on prayers (a), (c) and (d) above. Prayer (b) was later granted on 20 October 1994. There was no appeal by the appellant on prayers (a), (c) and (d) but only on prayer (b). On 24 October 1994, the deputy registrar assessed damages pursuant to prayer (c) ordering the appellant to pay to the respondent the sum of RM2,274,151.42. The appellant appealed against this assessment. The appellant attempted but failed to obtain a stay of execution both from the deputy registrar and the High Court judge. On 7 December 1994, the deputy registrar made a garnishee order absolute against Bank Bumiputra Malaysia pursuant to garnishee proceedings. The appellant's appeal against the said garnishee order absolute and an application for stay was dismissed by the High Court judge. The appellant then appealed to the Court of Appeal against the High Court's refusal to stay the garnishee order. On 19 December 1994, Bank Bumiputra Malaysia (garnishee) effected payment of the garnisheed sum to the respondent. On 3 January 1995, the Court of Appeal on being informed that the garnishee had made payment and upon an oral application by the appellant, granted a restraining order against the respondent, restraining him from disposing the sum deposited in a bank account. Thereafter, on 2 August 1995, the Court of Appeal, again on the application by the appellant, granted another order that the respondent deposit the judgment sum with the court. The respondent then filed an application for leave to appeal to the Federal Court but it was refused on the ground that the orders made by the Court of Appeal were interlocutory in nature and therefore unappealable. The respondent then applied to the Court of Appeal to set aside, the two orders alleging that they were made without jurisdiction. On 6 September 1996, the Court of Appeal allowed the respondent's application. Dissatisfied the appellant filed an application for leave to appeal to the Federal Court. On 18 October 1998, leave was granted. On 13 February 2000 when the present appeal came up for hearing, it was adjourned but the Federal Court made an order restraining the respondent from dissipating the judgment sum. On 29 March 2000, the Federal Court, on the application by the appellant, made another order that the judgment sum be deposited in court. The respondent initially applied to set aside these orders but subsequently withdrew them. Instead, he applied for stay but it was dismissed. The respondent had thereafter filed a fresh application to set aside the same orders. As yet, no date has been fixed for the hearing.

Scope And Effect Of Section 43 And Section 44 Of The Courts Of Judicature Act 1964

Much of the facts alluded to are quite irrelevant to the consideration of the question postulated. Here we are concerned essentially with the orders made by the Court of Appeal ie, the restraining order dated 3 January 1995 restraining the respondent from dissipating the judgment sum and the order dated 2 August 1995 directing the respondent to surrender the Certificate of Fixed Deposit Account where he had lodged the judgment sum. As mentioned a moment ago, these orders were subsequently set aside on 6 September 1996 by another panel of the Court of Appeal principally on the ground that the previous Court of Appeal had no jurisdiction to grant such orders having regard to the provisions of s. 43 of the Courts of Judicature Act 1964 which states:

> Wherever application may be made either to the High Court or the Court of Appeal, it shall be made in the first instance to the High Court.

In our view, s. 43 has to be construed in the context of the application for injunctive orders made by the appellant in this case. Given this scenario, it seems clear that the Court of Appeal had, on 6 September 1996, taken the position that as the application aforesaid was not made, in the first instance, to the High Court in contravention of s. 43, the Court of Appeal had no jurisdiction to entertain such an application. With respect, such a construction or proposition runs counter to the express provisions of s. 44 which specifically confers upon the Court of Appeal the jurisdiction to grant interim orders and make incidental directions in prescribed circumstances. Section 44 states:

> (1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.
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> (2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.
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> (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

In deciding the application, the Court of Appeal may take into consideration the failure on the part of the appellant in not complying with s. 43. It may inquire into the reasons for such failure. If the failure has caused prejudice to the other side resulting in injustice, it is perfectly entitled to reject the application. If no injustice is caused, there is no reason for not granting the application. All those are factors relevant to the exercise of discretion by the Court of Appeal. They do not however adversely affect the jurisdiction of the Court of Appeal in dealing with the said application.

Conclusion

For the reasons stated, it is obvious that the answer to the question posed must be in the negative. In our view, the Court of Appeal had, on 6 September 1996, erred in setting aside the injunctive orders made previously by the Court of Appeal on 3 January 1995 and 2 August 1995 respectively. On that ground alone, we think it appropriate to allow the appeal with costs here and below. We further order that the deposit be refunded to the appellant.